United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by
David A. Reed

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. **74-2270**

UNITED STATES OF AMERICA,

Appellee

v.

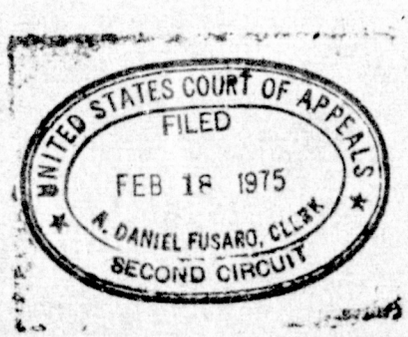
PHILIP J. McCANN,

Appellant

Appeal from the United States District Court for the District of Vermont

---

BRIEF FOR THE UNITED STATES



GEORGE W. F. COOK
United States Attorney

WILLIAM B. GRAY
DAVID A. REED
Assistant U. S. Attorneys
District of Vermont

TABLE OF CONTENTS

TABLE OF CASES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

PHILIP J. McCANN,

Appellant

BRIEF FOR THE UNITED STATES

Preliminary Statement

Philip J. McCann appeals from a judgment of conviction entered on September 16, 1974 in the United States District Court for the District of Vermont, after a two-day trial on June 6 and 7, 1974, before the Honorable Albert W. Coffrin, United States District Judge, and a jury. Indictment CR. 74-19, filed on February 13, 1974, charged McCann in three courts as

follows: Count I charged that McCann imported into the United States, from a place outside thereof, approximately one hundred sixty-eight (168) grams of cocaine, in violation of 21 U.S.C. §§ 812, 952, 960(a)(1) and 960(b)(2); Count II charged that McCann possessed the cocaine with intent to distribute and dispense it, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B); and Count III charged that McCann fraudulently imported merchandise into the United States contrary to law, in violation of 18 U.S.C. § 545.

Trial commenced on June 6, 1974 and on June 7, the jury returned a verdict of guilty on Counts I and II of the indictment. The Government elected not to proceed as to Count III of the indictment which was dismissed prior to jury deliberation. On September 16, 1974, the District Court, finding McCann to be a young adult offender under 18 U.S.C. § 4209, sentenced him under 18 U.S.C. § 5010(b) to the custody of the Attorney General for treatment and supervision until discharged.

STATEMENT OF FACTS

During the late evening of January 25, 1974, Philip J. McCann was a passenger on a bus which traveled non-stop from Montreal, Quebec, to the Port of Entry at Highgate Springs, Vermont, enroute to Burlington, Vermont. At approximately 10:00 P.M. the bus was stopped for a routine Customs and Immigration inspection at the border. Customs Inspector James B. Fuller boarded the bus and, consistent with routine procedures, asked the passengers for passports or other identification papers. (Tr. 27 - 28).* When Inspector Fuller examined McCann's passport he noticed a valid visa issued in Bogota, Colombia. As he was examining that visa, McCann stated it was the "wrong one" and showed Fuller another visa issued that very day in Montreal. (Tr. 28). His suspicions aroused by the two visas and by McCann's nervous behavior, Inspector Fuller asked McCann

---

* "Tr." refers to the transcript of the trial; "D.Br." to the defendant's Brief; "A." to the defendant's Appendix which is annexed to his Brief; and "GX" to the Government's Exhibits.

to remain on the bus while he completed his inspection so that he could take McCann to the Immigration office for a further inquiry. (Tr. 29). Inspector Fuller then completed his inspection of the remaining passengers and proceeded to check the bathroom on the bus where he found approximately 5 1/2 ounces of cocaine secreted behind the towel disposal. The cocaine was wrapped in light blue writing paper which was in turn enclosed in small plastic bags. (Tr. 31). A subsequent search of McCann's wallet disclosed additional pieces of blue paper similar to or identical with* the paper the cocaine was wrapped in. (Tr. 32, 129).

After seizing the cocaine, Inspector Fuller returned to McCann and asked him to accompany him inside the inspection station. (Tr. 30). There Inspector Fuller conducted a field test which confirmed the

---

* The Government called a forensic chemist who testified that all points of comparison were consistent and that the two papers "could have originated from the common source." (Tr. 134).

presence of cocaine in the plastic bags and telephoned Special Agents of the Drug Enforcement Administration to request their assistance.

After being advised of his Miranda rights both by Inspector Fuller and by Special Agent James V. Glazener of the Drug Enforcement Administration, (A. 29; Tr. 8), McCann told Special Agent Glazener that he had no permanent address, that he had not worked since April 1972 and that he had been touring the world for the past 21 months. (Tr. 52).* Notwithstanding his lack of employment, McCann possessed four $100. bills at the time of his arrest. McCann acknowledged to Special Agent Glazener that a paperback book found in his suitcase was his. (Tr. 55). That book, (GX 1), contained two handwritten calculations which reflected the approximate weight of the seized cocaine in ounces multiplied by 28 which is the number of grams in an ounce. (Tr. 54, 65). Special Agent Glazener

---

* The circumstances surrounding McCann's statements are set forth in greater detail in Point II, infra.

also examined McCann's passport, (GX 2), which reflected two recent trips from Bogota, Colombia, the main source of cocaine in the Western Hemisphere, to the United States. (Tr. 67).

Mr. and Mrs. Robert Reynard of Toronto, Ontario, were also on the bus during the evening of January 25, 1974 and were seated near McCann. They had observed McCann throughout the trip from Montreal to Highgate Springs and had several conversations with him. McCann had told them he was nervous about crossing the border even though his papers here in order. Both Mr. and Mrs. Reynard saw McCann go to the bathroom on the bus on two different occasions. They also saw McCann using a knife in his lap to cut some plastic bags which contained a white substance. (Tr. 142 - 47, 175 - 78).

McCann did not testify and presented no testimony or evidence in his defense.

POINT I.

THERE WAS AMPLE EVIDENCE TO ALLOW THE JURY TO CONCLUDE THAT McCANN INTENDED TO DISTRIBUTE THE 168 GRAMS OF COCAINE HE IMPORTED.

McCann argues that the District Court erred by denying his motions for judgment of acquittal and to set aside the verdict with respect to Count II which charged that he possessed 168 grams of cocaine with the intent to distribute it. This Court need not reach this argument, and in any event, the argument is based on an incorrect legal standard and ignores the evidence.

McCann was convicted both of importing cocaine (Count I) and possessing it with intent to distribute it (Count II). His sentence as a Young Adult Offender was imposed on both counts. McCann in no way challenges his conviction on Count I. The Supreme Court has recently reaffirmed that under such circumstances an appellate court may properly decline to consider his challenge to Count II. Barnes v. United States, 412 U.S. 837, 848 n.16 (1973). Similarly, in United States v. Gaines, 460 F.2d 176 (2d Cir. 1972), this Court has exercised its discretion under the concurrent sentence doctrine

not to review a conviction on one count where the conviction on another is unquestionably valid.*

In any event, the District Court properly denied the motions for acquittal and to set aside the verdict. The present standard for determining whether to permit a case to be decided by the jury was set forth in United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972), quoting Curley v. United States, 160 F.2d 229, 232 - 233 (D.C. Cir.), cert. denied, 331 U.S. 837 (1947):

> The true rule, therefore, is that a trial judge, in passing upon a motion for a directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilty beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

---

* But cf., United States v. Papadakis, ___ F.2d ___ (2d Cir. January 10, 1975)(Slip Op. 1231, 1253)(involving concurrent sentences on convictions in different cases where substantial collateral consequences could result from the challenged conviction).

McCann argues, (D.Br. 11), that the "evidence, and reasonable emphasis (sic) to be drawn therefrom, must not only be consistent with guilt, but inconsistent with innocence." The argument is simply wrong. As this Court noted in Taylor,

> We in no way subscribe to the doctrine that "where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt," which continues to be frequently urged by defense lawyers despite the Supreme Court's repudiation of it in Holland v. United States, 348 U.S. 121, 139-140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954).

In addition, the evidence adduced at trial virtually compels the conclusion that McCann intended to distribute at least some of the cocaine he imported. In United States v. Mather, 465 F.2d 1035 (5th Cir.), cert. denied, 409 U.S. 1085 (1972), the Court found that mere possession of 197.75 grams valued at approximately $2500, only 29 grams more than that imported by McCann, alone supported the inference of intent to distribute. See also Turner v. United States, 396 U.S. 398,420 (1970) (sustaining the statutory inferences of possession with intent to distribute contained in 26 U.S.C. § 4704(a) based on possession of 48.25 grams of a substance containing 15.2% heroin).

The evidence against McCann, however, was not limited to his mere possession of the cocaine. The evidence also showed that McCann, who had not worked for a living since April 1972, had been travelling around the world with no apparent means of support. He entered the United States from Bogota, Colombia, a major cocaine distribution center, for the third time in as many months, (GX 2; Tr. 67 - 68), in possession of $400., 168 grams of cocaine and a book containing calculations from ounces to grams, calculations which were totally superfluous if McCann intended to consume the cocaine himself.* Certainly the jury could reasonably infer from these compelling facts that McCann intended to distribute** at least some of the cocaine he imported.

---

* There is absolutely no evidence in the case that McCann used cocaine himself.

** Even if the evidence of intent to distribute were insufficient, McCann nevertheless would be guilty of simple possession in violation of 21 U.S.C. § 844, a lessor included offense of § 841. United States v. Blake, 484 F.2d 50, 58 (8th Cir. 1973), cert. denied, 94 S.Ct. 3076 (1974). Under the Youth Corrections Act, 18 U.S.C. § 5010, as extended to McCann by 18 U.S.C. § 4209, the District Court had the power to impose the same sentence upon conviction under § 844 as it did upon conviction under § 841. Guidry v. United States, 433 F.2d 968 (5th Cir, 1970).

POINT II.

McCANN'S STATEMENTS WERE VOLUNTARY AND IN COMPLIANCE WITH MIRANDA AND 18 U.S.C. §3501.

McCann was given Miranda warnings initially by Customs Inspector James Fuller. (A. 29; Tr. 8). Special Agent Glazener of the Drug Enforcement Administration repeated the warnings to McCann again upon his arrival, at which time McCann indicated he had been advised of his rights by Fuller and understood them. (A. 34; Tr. 13). Special Agent Glazener advised McCann that the cocaine had been found, asked him to cooperate, told McCann that charges probably would be brought against him for importing cocaine and initially gave McCann half an hour to "get his head together," as requested by McCann. (A. 34 - 35; Tr. 13 - 14). A subsequent one-half hour was similarly granted.* (Tr. 74). Glazener gave McCann a telephone book

---

* These one-half hour periods actually stretched out over two hours since Agent Glazener was not able to return to McCann and speak with him immediately upon expiration of each half-hour. (A. 35 - 36; Tr. 14).

with listings of local attorneys on two occasions and told McCann he did not want him to make any statement until McCann had an opportunity to consult with counsel. (A. 35; Tr. 14; Tr. 71). Glazener returned after the second one-half hour, at which time McCann indicated that he did not want to speak with an attorney. (A. 30; Tr. 9). McCann then stated that he did not wish to talk about the cocaine, but indicated a willingness to discuss his background, (A. 30 - 31; Tr. 10), although he had been warned that he was not required to. (A. 31; Tr. 10); (A.35; Tr. 14); (A. 40; Tr. 19). At no time did Agent Glazener discuss cocaine with McCann, (A. 32; Tr. 11), and in fact Glazener did not again broach the subject. (A. 33; Tr. 12).

McCann has never claimed he did not understand his rights, nor has he ever testified that he was misled by Agent Glazener into discussing an area he did not wish to. Consistent with Miranda, McCann certainly could agree to discuss certain areas and not others, and it is clear from the record that this was what he chose to do. He was given opportunities to decide what course of action to take, to consult with counsel if he desired and indicated that he did not wish to discuss the cocaine but wanted to discuss his personal travel and background. (A. 32; Tr. 11).

The trial court accordingly found that McCann voluntarily had discussed his travel and earning history. (A. 45; Tr. 23).

Miranda provided that an individual could waive his right to remain silent, and it is clear that McCann chose to do so except with respect to the cocaine. It is noteworthy that the trial court did not find an intent by McCann to limit his statements to his personal history, but rather found that McCann voluntarily discussed his travel and earnings. The subsequent use of these statements at trial in no way vitiated his waiver at the time he made them.

This Court discussed the voluntariness of a waiver in analagous circumstances* in United States v.

---

* Defendant also has objected to the admission of McCann's statements on the basis of a Rule 5(a) violation for unnecessary delay in arraignment before the Magistrate. This issue is raised for the first time on appeal, and is not properly before this Court for consideration. United States v. Indiviglio, 352 F.2d 276, 278 - 80 (2d Cir.1965) (en banc), cert. denied, 383 U.S. 907 (1966). The failure to raise this issue before the trial court has deprived the Government of the opportunity to make a record of efforts made to arrange an earlier arraignment and the factor of distance and magistrate availability in Vermont which are relevant to determine whether there was any unnecessary delay. In any event, statements were made within a few hours of his arrest and any subsequent delay is irrelevant.

Collins, 462 F.2d 792 (2d Cir.), cert. denied, 409 U.S. 988 (1972). Waiver is not an issue here however since McCann waived his right to remain silent on all issues except the cocaine. Nevertheless, Collins would admit the statements if this Court finds there is a voluntariness issue.

Collins was given the Miranda warnings five times over a period of 21 hours relative to a bank robbery. He would not discuss the bank robbery on three occasions, gave negative responses to questions about the bank robbery on one, gave no response at all the last time he was warned, and finally confessed after being asked again if he wanted to make a statement. The Court noted that Collins had not been subjected to strategems to take advantage of his youthful ignorance or naivete, was treated for his narcotic habit and was subject to neither intimidating police conduct nor mistreatment. 462 F.2d at 796. The record clearly shows how well McCann was treated, and as noted in Collins: "The record does not show that the agents ignored any request of Collins." Id.

Collins was told that questions would cease at any time he desired; McCann was told several times that anything he said could be used against him. McCann was

not questioned when he indicated a desire not to, as was Collins. McCann was considerately treated throughout, as was Collins. Id. The Court in Collins ultimately noted:

> So long as such reconsideration [of a refusal to answer questions] is urged in a careful, noncoercive manner at not too great length and in the context that a defendant's assertion of his right not to speak will be honored, it does not violate the Miranda mandate.

Id. at 797. McCann was accorded treatment and consideration at least as favorable as that accorded Collins, was given more than adequate opportunity to limit areas of inquiry or not answer questions at all, and accordingly his statements were admissible under Miranda.

Further criteria for determining the admissibility of McCann's statements are found in 18 U.S.C. § 3501, as noted by defendant. (D.Br. 18). The application of the factors set out in 3501(b) to the facts here renders McCann's statements equally admissible under this section. See United States v. Vigo, 487 F.2d 295, 299 (2d Cir. 1973).

CONCLUSION

McCann's convictions should be affirmed.

Respectfully submitted,

GEORGE W. F. COOK
United States Attorney for
the District of Vermont,
Attorney for the United
States of America

WILLIAM B. GRAY
DAVID A. REED
Assistant United States Attorneys,
Of Counsel

February 13, 1975

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee v. PHILIP J. McCANN, Appellant	)	Docket No. 74-2270

CERTIFICATE OF SERVICE

I do hereby certify that on this 13th day of February, 1975, I made service of the BRIEF FOR THE UNITED STATES upon Philip J. McCann, by mailing two copies of the same to his attorney of record, John P. Maley, Esquire, 192 College Street, Burlington, Vermont 05401.

GEORGE W. F. COOK
United States Attorney

By: William B. Gray
WILLIAM B. GRAY
Assistant U. S. Attorney

Address:

P.O. Box 10
Rutland, VT. 05701